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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

WESTERN CARTRIDGE COMPANY, a Corporation, Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and AMERICAN FEDERATION OF LABOR and Its Affiliated Organizations, Respondents.

WESTERN CARTRIDGE EMPLOYEES' INDEPENDENT UNION, etc., Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, AMERICAN FEDERATION OF LABOR and Its Affiliated Organizations, Respondents.

No. 163

Petitions to Review and Set Aside, and on Request for Enforcement of, an Order of the National Labor Relations Board.

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Seventh Circuit

and

SUPPORTING BRIEF.

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PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Seventh Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Western Cartridge Company, a corporation, respectfully shows:

Your petitioner seeks to review the opinion and decision of the Circuit Court of Appeals for the Seventh Circuit, rendered on March 1, 1943, and the decree of said Court

entered pursuant to said opinion on April 14, 1943, wherein the Court of Appeals denied a petition to set aside an order of the National Labor Relations Board and granted enforcement of such order.

The opinion of the Circuit Court of Appeals is reported in 134 Fed. (2d) 240.

I.

JURISDICTION.

The opinion of the Circuit Court of Appeals was filed on March 1, 1943. The decree of the Circuit Court of Appeals, entered in conformity with said opinion, enforcing compliance with the order of the National Labor Relations Board, was entered on April 14, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 [28 U. S. C. A., Sections 347 (a) and 350] and Section 10 (e) of the National Labor Relations Act [29 U. S. C. A., Section 160 (e)].

II.

QUESTIONS PRESENTED.

The following questions are presented for consideration in connection with this petition for a writ of certiorari:

1. Does the National Labor Relations Act preclude the right of individual contract between employer and employee, either prior to or after the selection of representatives for the purpose of collective bargaining, when the contracts (a) contain no provisions repugnant to the National Labor Relations Act, and (b) are not obtained by means of any unfair labor practice?

2. Has the National Labor Relations Board, or the Court of Appeals, power, either prior to or after the selection of representatives for the purpose of collective bargaining, to enjoin an employer from giving effect to individual con-

tracts of employment then in existence (without prejudice to the assertion by the employees of any legal rights they may have acquired under such contracts) when such contracts (a) contain no provisions repugnant to the National Labor Relations Act, and (b) have not been obtained by means of any unfair labor practice?

3. Has the National Labor Relations Board, or the Court of Appeals, power, either prior to or after the selection of representatives for the purpose of collective bargaining, to enjoin in perpetuity an employer from requesting its employees to enter into individual contracts of employment when such contracts (a) contain no provisions repugnant to the National Labor Relations Act, and (b) have not been obtained by means of any unfair labor practice?

4. Did the Trial Examiner of the National Labor Relations Board err in refusing to admit the testimony of individual members of the Western Cartridge Employees' Independent Union with respect to the reasons why and the circumstances under which they joined said union and the fact that no foreman, supervisor, superintendent, official or other representative of the Company at any time asked, suggested or urged them to join such union or attempted in any way to direct, control, or affect their actions as members of such union?

5. Is the finding of the National Labor Relations Board, upheld by the Circuit Court of Appeals, that the Company interfered with the formation and administration of the Western Cartridge Employees' Independent Union, supported by substantial evidence?

6. Is the finding of the National Labor Relations Board, upheld by the Circuit Court of Appeals, that William Elliott was discharged because he failed to act as the representative of the Western Cartridge Employees' Independent Union, and that his critical attitude was used as a pretext to justify his discharge, supported by substantial evidence?

III.

STATUTE INVOLVED.

The pertinent provisions of the National Labor Relations Act (29 U. S. C. A., Section 151 et seq.) are as follows:

"§ 157. (Sec. 7) Right of employees as to organization, collective bargaining, etc.

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

"§ 158. (Sec. 8) Unfair labor practices by employer defined.

"It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title. * * *"

"§ 160. (Sec. 10)

* * * * * * *

"(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person

to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint."

IV.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The facts, in so far as they are material to the questions presented, are as follows:

Petitioner, Western Cartridge Company (sometimes hereinafter referred to as the "Company"), operates a plant at East Alton, Illinois, where it is engaged in manufacturing, selling and distributing small arms ammunition, explosives and related products.

Beginning in the year 1914 or 1915 the Company began to use individual employment contracts in its relations with its employees. These individual contracts were used continuously until the year 1921, when, during the depression in the ammunition business following the end of the First World War, they were discontinued. In 1933 the Company revived the use of these individual contracts and they have been used ever since (Supp. p. 519).*

An employee becomes eligible to receive one of these contracts only after first serving a three months probationary period, at which time he is offered a contract designated as an "Original Contract" running for a period of six months. At the expiration of the Original Contract the employee, if retained, is offered a contract designated as an "Extension Agreement," running for a period of one year. Thereafter, as these Extension Agreements expire,

*Citations to the Supplement to Petitioner's Brief will be designated as (Supp. p. ...)

the employee is given an opportunity to renew the contract on the same form (Supp. pp. 273-275, 492-501, 559).

All of the provisions of the Original Contract and of the Extension Agreement material to the present case are identical except the designation of the length of the term. For the convenience of the Court a copy of the Original Contract is set out in full in an appendix to this petition and brief (pp. 31-35). (Both forms may be found in Supp. pp. 563-572.)

The contracts themselves contain no provisions repugnant to the National Labor Relations Act, as will be apparent upon examination.

Although the Board and the American Federation of Labor strenuously urged the proposition that the contracts by their terms impose illegal restraints upon the exercise by the employees of rights guaranteed by the Act, the Circuit Court of Appeals refused to uphold such contention and made no such finding.

Neither the Board nor the Court found that the individual contracts had been obtained by means of any unfair labor practice.

Nearly all of the Company's eligible employees signed such individual contracts. However, a number refused to sign without affecting in any way their status or condition of employment with the Company (Supp. pp. 274-275, 500, 501).

There was no union among the Company's employees from the year 1933 to 1937. In 1937 the C. I. O. held several meetings seeking to organize employees of the Company, and some of the employees signed applications for membership. Following these efforts of the C. I. O. to organize the Company's employees, in the year 1937 a group of the Company's nonsupervisory employees, on their own initiative, decided to form a labor organization of their own. An attorney was employed and the organization was perfected under the name of Western Cartridge Employees'

Independent Union, commonly referred to as the "Independent" (Supp. pp. 316-335). The Trial Examiner found that the Company had not instigated the formation of the Independent. More than 85 per cent of the Company's hourly-paid production and maintenance employees joined the Independent and a demand was made on the Company for recognition (Supp. pp. 250-252, 260, 267-270, 516-517). After demanding and receiving proof of majority representation, the Company recognized the Independent as the sole bargaining agent under the National Labor Relations Act, signing a contract with the Independent on August 12, 1937, known as "The Basic Agreement" (Supp. pp. 553-554).

Following the recognition of the Independent, the Company and the Independent engaged in collective bargaining repeatedly and almost continually from August of 1937 down to December of 1942 with respect to practically every matter which could conceivably be the subject of collective bargaining, including wages, hours and working conditions (Supp. pp. 210-230, 230-248, 252-259). Beginning about the middle of January, 1941, the American Federation of Labor carried on an active organizational campaign which was initially confined to the approximately 600 employees in the Smokeless Powder Division. This campaign was energetic and successful, and by the middle of the year 1941 more than 500 of the employees in the Smokeless Powder Division had become members of Chemical Workers Local Union No. 22574, affiliated with the American Federation of Labor (Supp. p. 68). A contract was signed with Local No. 22574 on August 2, 1941, and a supplement on September 29, 1941. In the meantime, along in the late spring or early summer of 1941, the American Federation of Labor, having completed its organization of the Smokeless Powder Division, extended its activities to the balance of the plant, and began to sign up members principally in the cast shop and brass mill. Pursuant to these activities sev-

eral hundred members were signed up and another A. F. of L. local union was chartered in August of 1941.

Subsequently the American Federation of Labor and Its Affiliated Organizations was certified by the National Labor Relations Board, following an election, as the collective bargaining agent for all of the Company's production and maintenance workers at its East Alton Plant. 11 Labor Relations Reporter 807.

On July 25, 1941, William Elliott, a caster in the cast shop, and a member of Local 333, was discharged.

The complaint charged, inter alia, (a) that the Company "did * * * solicit and obtain from its employees individually signed promises, including among other things limitations on employees' right to strike and engage in other concerted activities," evidently referring to the individual employment contracts, (b) that the Company instigated the formation of the Independent and dominated and interfered with its administration, and (c) that the Company discriminatorily discharged William Elliott.

At the hearing the Trial Examiner refused to admit the testimony of certain members of the Independent with respect to the reasons why and the circumstances under which they joined the said union, and the fact that no foreman, supervisor, superintendent, official or other representative of the Company at any time asked, suggested or urged them to join such union, or attempted in any way to direct, control or affect their actions as members of such union.

The Board found against the Company on each of the three charges above referred to, and affirmed the ruling of the Trial Examiner with respect to the refusal to receive the testimony of individual members of the Independent.

The Court upheld the finding of the Board that by urging its employees to sign the individual contracts after the National Labor Relations Act went into effect the Company had interfered with the employees' right to self-organization, saying:

"The Board found that the effect of the contracts has been to forestall union activity among the company's employees and to create a permanent barrier to union organization among them. We agree with counsel for the Board that interference is no less interference because it is accomplished through allurements rather than coercion, when, as here, the system is employed to stem a tide of organization and is adopted as a means of eliminating outside unions as collective bargaining agents of the company's employees, National Licorice Co. v. National Labor Relations Board, 309 U. S. 350."

The Court ordered the Company to:

"1. Cease and desist from:

"(a) Giving effect to its individual contracts of employment with employees (without prejudice to the assertion by the employees of any legal rights they may have acquired under such contracts), or to any modification, continuation, extension, or renewal thereof, and from requesting its employees to enter into any similar contracts of employment."

The Court also approved the refusal to receive the testimony of individual members of the Independent, and upheld the Board in findings that the Company had instigated the formation of and dominated and interfered with the administration of the Independent, and had discriminatorily discharged William Elliott.

V.

REASONS RELIED ON FOR ALLOWANCES OF WRIT.

1. The decision of the Circuit Court of Appeals in holding that the National Labor Relations Act precludes the right of individual contract between an employer and his employees either prior to or after the selection of repre-

sentatives for the purpose of collective bargaining, when the contracts (a) contain no provisions repugnant to the Act, and (b) are not obtained by means of any unfair labor practice, is directly contrary to and in conflict with the decisions of the Supreme Court of the United States in the cases of **Virginian Railway Co. v. Federation, 300 U. S. 515, and National Labor Relations Board v. Jones & Laughlin, 301 U. S. 1.**

2. The decision of the Circuit Court of Appeals in enjoining the Company from giving effect to individual contracts of employment (without prejudice to the assertion by the employees of any legal rights they may have acquired under such contracts), when such contracts (a) contain no provisions repugnant to the National Labor Relations Act, and (b) have not been obtained by means of any unfair labor practice, and in enjoining in perpetuity the Company from requesting its employees to enter into any similar contracts of employment, has decided a Federal question in a way probably in conflict with the following applicable decisions of the Supreme Court of the United States:

National Licorice Co. v. National Labor Relations Board, 309 U. S. 350, 364, 367;
Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197;
Virginian Railway Co. v. Federation, 300 U. S. 515;
National Labor Relations Board v. Jones & Laughlin, 301 U. S. 1,

and has decided a question of substance relating to the construction or application of the National Labor Relations Act and of the Fifth Amendment to the Constitution of the United States which has not been, but should be, settled by the Supreme Court of the United States.

3. The decision of the Circuit Court of Appeals affirming the ruling of the Trial Examiner in refusing to admit the

testimony of individual members of the Independent with respect to the reasons why and the circumstances under which they joined said union, and the fact that no foreman, supervisor, superintendent, official or other representative of the Company had urged them to join such union, or attempted in any way to direct, control or affect their actions as members of such union, is directly contrary to and in conflict with the decision of the Supreme Court of the United States in the case of **National Labor Relations Board v. Indiana & Michigan Electric Co., 318 U. S. 9, 28,** and also is directly contrary to and in conflict with the decision of the United States Circuit Court of Appeals for the Eighth Circuit in the case of **Donnelly Garment Co. v. National Labor Relations Board, 123 Fed. (2d) 215, 222-223.**

4. The decision of the Circuit Court of Appeals upholding the finding of the Board that the Company had instigated the formation of the Independent, and dominated and interfered with its administration, the said finding not being supported by substantial evidence, is directly contrary to and in conflict with the decisions of the Supreme Court of the United States in the cases of **Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, and National Labor Relations Board v. Columbian Enameling & Stamping Co., 306 U. S. 292.**

5. The decision of the Circuit Court of Appeals upholding the finding of the Board that William Elliott had been discriminatorily discharged, the said finding not being supported by substantial evidence, is directly contrary to and in conflict with the decisions of the Supreme Court of the United States in the cases of **Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, and National Labor Relations Board v. Columbian Enameling & Stamping Co., 306 U. S. 292.**

VI.

PRAYER FOR WRIT.

Wherefore, your petitioner, Western Cartridge Company, respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Seventh Circuit, and commanding that Court to certify and send to this Court for its determination, on a date certain to be therein named, a full and complete transcript of the record and of all the proceedings in the Consolidated Case numbered on its docket Nos. 8142 and 8155, and entitled "Western Cartridge Company, a corporation, Petitioner, vs. National Labor Relations Board and American Federation of Labor and Its Affiliated Organizations, Respondents,—Western Cartridge Employees' Independent Union, Etc., Petitioner, vs. National Labor Relations Board, American Federation of Labor and Its Affiliated Organizations, Respondents," and that the judgment and decree of said Circuit Court of Appeals for the Seventh Circuit be reversed and modified and the case be remanded with directions to set aside the order of the National Labor Relations Board and to deny the request for its enforcement, and that your petitioner may have such other and further relief in the premises as to this Court may seem proper.

Respectfully submitted,

WESTERN CARTRIDGE COMPANY,

By THOMAS S. McPHEETERS,
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